

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JULIAN L.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

Case No. C21-887 TLF

ORDER REVERSING AND  
REMANDING DEFENDANT'S  
DECISION TO DENY BENEFITS

Plaintiff has brought this matter for judicial review of defendant's denial of his applications for disability insurance and supplemental security income (SSI) benefits.

The parties have consented to have this matter heard by the undersigned Magistrate Judge. 28 U.S.C. § 636(c); Federal Rule of Civil Procedure 73; Local Rule MJR 13.

I. ISSUES FOR REVIEW

A. Whether the ALJ Properly Evaluated the Medical Opinion Evidence

B. Whether the ALJ Properly Evaluated Plaintiff's Subjective Symptom  
Testimony

C. Whether the ALJ Properly Assessed the RFC

II. BACKGROUND

On December 31, 2018, plaintiff filed a Title II application for a period of disability and Title XVI application for SSI, alleging in both applications a disability onset date of March 1, 2018. Administrative Record ("AR") 79. Plaintiff's applications were denied

1 upon official review and upon reconsideration (AR 91, 104, 150, 166). A hearing was  
2 held before Administrative Law Judge (“ALJ”) Susan Smith on December 2, 2020. AR  
3 36–76. On December 21, 2020, ALJ Smith issued a decision finding that plaintiff was  
4 not disabled. AR 12–35.

5 Plaintiff seeks judicial review of the ALJ’s December 21, 2020 decision. Dkt. 11.

### 6 7 III. STANDARD OF REVIEW

8 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s  
9 denial of Social Security benefits if the ALJ’s findings are based on legal error or not  
10 supported by substantial evidence in the record as a whole. *Revels v. Berryhill*, 874  
11 F.3d 648, 654 (9th Cir. 2017). Substantial evidence is “such relevant evidence as a  
12 reasonable mind might accept as adequate to support a conclusion.” *Biestek v.*  
13 *Berryhill*, 139 S. Ct. 1148, 1154 (2019) (internal citations omitted).

### 14 IV. DISCUSSION

15 In this case, the ALJ found that plaintiff’s severe impairments are: multiple  
16 sclerosis (MS), mood disorder, and neurocognitive disorder. AR 18. Based on the  
17 limitations stemming from these impairments, the ALJ found that plaintiff has the  
18 residual functional capacity (RFC) to perform light work. AR 19. Relying on vocational  
19 expert (“VE”) testimony, the ALJ found at step four that plaintiff could not perform his  
20 past relevant work but could perform other jobs that exist in significant numbers in the  
21 national economy; therefore, the ALJ determined at step five that plaintiff was not  
22 disabled. AR 28-30.

1       A. Whether the ALJ Properly Evaluated Medical Opinion Evidence

2           Plaintiff assigns error to the ALJ's evaluation of the medical opinions of Patricia  
3 Kraft, Ph.D. and Richard Mesher, M.D. Dkt. 11, pp. 3–14.

4           1. Medical Opinion Standard of Review

5           Under current Ninth Circuit precedent, an ALJ must provide “clear and  
6 convincing” reasons to reject the uncontradicted opinions of an examining doctor, and  
7 “specific and legitimate” reasons to reject the contradicted opinions of an examining  
8 doctor. *See Lester v. Chater*, 81 F.3d 821, 830–31 (9th Cir. 1995).

9           The Social Security Administration changed the regulations applicable to  
10 evaluation of medical opinions; hierarchy among medical opinions has been eliminated,  
11 but ALJs are required to explain their reasoning and specifically address how they  
12 considered the supportability and consistency of each opinion. *See* 20 C.F.R. §  
13 416.920c; Revisions to Rules Regarding the Evaluation of Medical Evidence, 82 Fed.  
14 Reg. 5844-01 (Jan. 18, 2017).

15           Regardless of whether a claim pre- or post-dates this change to the regulations,  
16 an ALJ's reasoning must be supported by substantial evidence and free from legal  
17 error. *Ford v. Saul*, 950 F.3d 1141, 1153-56 (9th Cir. 2020) (citing *Tommasetti v. Astrue*,  
18 533 F.3d 1035, 1038 (9th Cir. 2008)); *see also Murray v. Heckler*, 722 F.2d 499, 501–02  
19 (9th Cir. 1983).

20           Under 20 C.F.R. § 416.920c(a), (b)(1)-(2), the ALJ is required to explain whether  
21 the medical opinion or finding is persuasive, based on whether it is supported and  
22 whether it is consistent.

1           2. Opinion of Dr. Kraft

2           Patricia Kraft, Ph.D. evaluated plaintiff on November 19, 2019, by reviewing his  
3 medical records. AR 141-143, 147-148. She opined that plaintiff retained the capacity  
4 to: carry out simple instructions. But she found moderate limitations concerning  
5 plaintiff's ability to continuously maintain concentration, persistence, and pace (CPP) for  
6 up to two hours; maintain adequate attendance; and complete a normal  
7 workday/workweek within normal tolerances of a competitive workplace. AR 148. Dr.  
8 Kraft further opined that due to plaintiff's mental health symptoms, there would be  
9 occasional interruption in his workday "related to CPP" and he would occasionally miss  
10 work. AR 148.

11           The ALJ found Dr. Kraft's opinion unpersuasive because (1) it was inconsistent  
12 with the objective medical evidence, (2) inconsistent with plaintiff's daily activities, and  
13 (3) plaintiff refused treatment. Plaintiff argues that the ALJ erred by failing to consider  
14 the latter part of Dr. Kraft's opinion—that there would be interruption in his workday  
15 related to CPP and that plaintiff would occasionally miss work. Dkt. 11, p. 6.

16           With regards to the ALJ's first reason, a finding that a  
17 physician's opinion is inconsistent with the medical record may serve as a specific and  
18 legitimate reason for discounting it. See 20 C.F.R. §§  
19 404.1527(c)(4), 416.927(c)(4); *Ghanim v. Colvin*, 763 F.3d 1154, 1161 (9th Cir.  
20 2014) (An ALJ may give less weight to medical opinions that conflict with treatment  
21 notes).

22           Here, in discounting Dr. Kraft's opinion, the ALJ pointed to evidence of plaintiff's  
23 neurological examinations showing intact cognition, memory and concertation within  
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1 normal limits, and normal mood. AR 493, 551, 557, 607, 724, 783-84, 793, 885, 871,  
2 875, 879, 888-89, 893. Other cited evidence included examinations from five  
3 appointments showing plaintiff's intact memory. AR 793, 798, 803, 808, 813. The Court  
4 notes that it is specifically stated in these five records that no examinations took place  
5 as the appointments were conducted remotely and the results were forwarded from a  
6 previous exam for "continuity." But even after taking this into consideration, the  
7 evidence cited by the ALJ still substantially supports the finding that Dr. Kraft's opinion  
8 was inconsistent with objective medical evidence, therefore the ALJ has provided a  
9 valid reason to discount Dr. Kraft's opinion.

10 Plaintiff contends that in discounting Dr. Kraft's opinion, the ALJ also improperly  
11 failed to consider other medical evidence and provides a summary of evidence  
12 concerning plaintiff's fatigue and complaints. Dkt. 11, pp. 8–9. However, plaintiff has  
13 specifically assigned error only to the ALJ's evaluation of Dr. Kraft's opinion regarding  
14 plaintiff's mental health systems affecting his ability to maintain CPP. Accordingly, the  
15 Court will not consider plaintiff's other challenges to the ALJ's evaluation of Dr. Kraft's  
16 opinion. *Carmickle v. Commissioner, Social Sec. Admin.*, 533 F.3d 1155, 1161 n. 2 (9th  
17 Cir. 2008) (quoting *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1164 (9th  
18 Cir. 2003)).

19 Further, because the Court has found that the ALJ relied on substantial evidence  
20 in discounting Dr. Kraft's opinion, there is no need for the Court to analyze whether the  
21 ALJ committed error by discounting it because it was inconsistent with plaintiff's daily  
22 activities or because plaintiff refused treatment. Any errors committed based on those  
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1 grounds would be harmless. See *Carmickle*, 533 F.3d at 1162-1163 (inclusion of  
2 erroneous reasons is harmless).

3 3. Opinion of Dr. Mesher

4 Richard Mesher, M.D., plaintiff's treating neurologist, evaluated plaintiff on  
5 several occasions during the relevant period. Plaintiff specifically challenges the ALJ's  
6 evaluation of Dr. Mesher's opinion from October 31, 2019. Dkt. 11, p. 11. In that  
7 opinion, Dr. Mesher identified that plaintiff has the following symptoms as a result of his  
8 MS diagnosis: fatigue, balance problems, difficulty remembering, depression, difficulty  
9 solving problems, and double or blurred vision/partial. AR 618. Dr. Mesher opined that  
10 plaintiff's experience of pain, fatigue, and other symptoms will frequently (20% or more  
11 of day) interfere with attention and concentration within a competitive, full time work  
12 environment. AR 619.

13 The Commissioner argues that the new Social Security regulations have affected  
14 the legal standards an ALJ must use when evaluating medical opinions, and that this  
15 Court should abandon the "clear and convincing" and "specific and legitimate" legal  
16 standards used for when rejecting opinions of an examining physician. Dkt. 12, pp. 7–8.

17 The Ninth Circuit has not yet considered the 2017 regulations, or whether the  
18 change in regulations will cause the Court of Appeals to reevaluate its holdings  
19 regarding the legal standards of "clear and convincing" or "specific and legitimate." The  
20 Court is bound by precedent of the Ninth Circuit and may not overrule a decision of the  
21 United States Court of Appeals for the Ninth Circuit. See *In re Albert-Sheridan*, 960 F.3d  
22 1188, 1192–93 (9th Cir. 2020) (the decision of a three-judge panel of the Ninth Circuit  
23 cannot be overruled by a different three-judge panel; only a decision of the en banc  
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1 panel of the Ninth Circuit, or a decision of the United States Supreme Court, may  
2 overturn a decision of a three-judge panel of the Ninth Circuit); *In re Walldesign, Inc.*,  
3 872 F.3d 954, 969 (9th Cir. 2017) (unless there is intervening Supreme Court or Ninth  
4 Circuit en banc precedent, a legal test that has been adopted by a three-judge panel will  
5 not be overturned); *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001) (published  
6 opinions of a three-judge panel are binding authority in the Ninth Circuit, unless a  
7 published opinion is overturned by an en banc decision, or the United States Supreme  
8 Court).

9       The Ninth Circuit has repeatedly held that an ALJ must have specific, legitimate  
10 reasons supported by substantial evidence in order to reject or discount the opinion of  
11 an examining doctor, if the opinion is contradicted by another doctor's opinion. See  
12 *Lester v. Chater*, 81 F.3d 821, 830–31 (9th Cir. 1995); *Ryan v. Commissioner of Social*  
13 *Sec.*, 528 F.3d 1194, 1198–99 (9th Cir. 2008). The “specific and legitimate reasons”  
14 language used by the Ninth Circuit in precedent is an appellate standard – established  
15 in *Murray v. Heckler*, 722 F.2d 499, 501–02 (9th Cir. 1983), for determining whether the  
16 ALJ erred; it is not an interpretation of the Social Security statutes or the 2017 revisions  
17 to the federal regulations promulgated by the Social Security Administration. *Cf. Kisor v.*  
18 *Wilkie*, 139 S.Ct. 2400, 2412–2418 (2019) (explaining the Court gives *Auer* deference  
19 only if the agency's rule is ambiguous, the agency's interpretation is reasonable, and it  
20 is an authoritative and considered judgment of the agency); *Larson v. Saul*, 967 F.3d  
21 914, 925 (9th Cir. 2020) (recognizing the Social Security Administration has authority to  
22 make rules carrying the force of law, under 42 U.S.C. § 405(a)). Therefore, the Social  
23 Security Administration's new regulations cannot supersede this long-standing  
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1 substantive legal standard, which is subject to stare decisis as precedent from the Ninth  
2 Circuit Court of Appeals. See *Kathleen G. v. Comm'r of Soc. Sec.*, No. C20-461 RSM,  
3 2020 WL 6581012, at \*3 (W.D. Wash. Nov. 10, 2020) (finding the new regulations do  
4 not clearly supersede the “specific and legitimate” standard because the “specific and  
5 legitimate” standard refers not to how an ALJ should weigh or evaluate opinions, but  
6 rather the standard by which the Court evaluates whether the ALJ has reasonably  
7 articulated his or her consideration of the evidence).

8 In this case, Dr. Mesher’s opinion was contradicted by the opinions of state  
9 agency consultants. AR 102, 148, 164. The Court will therefore consider whether the  
10 ALJ specifically and legitimately explained how the ALJ considered the supportability  
11 and consistency factors regarding Dr. Mesher’s opinions. *Ryan*, 528 F.3d at 1198–99.

12 Here, plaintiff challenges the ALJ’s finding that – Dr. Mesher’s opinion is  
13 unpersuasive because (1) his own treatment notes, and (2) the objective medical  
14 evidence, indicate that plaintiff’s symptoms are not as severe as provided in his opinion.  
15 Dkt. 11, p. 11–14.

16 With respect to the ALJ’s first reason, an ALJ may discount an examining  
17 doctor’s opinion based on inconsistencies with the doctor’s own notes. See *Tommasetti*  
18 *v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008). Here, the ALJ pointed to a December  
19 2019 treatment note by Dr. Mesher describing that plaintiff had “no new neurological  
20 symptoms,” was “relatively stable neurologically,” “alert, oriented, conversant,” and “not  
21 experiencing a lot of pain at this point.” AR 711-12. Yet the ALJ disregards other  
22 portions of that note indicating plaintiff continued to experience significant psychological  
23 problems. AR 711.



1 The ALJ also reasoned that Dr. Mesher's treatment notes failed to mention  
2 plaintiff's headaches or profound fatigue—but this is not supported by the record, as his  
3 notes often discussed plaintiff's MS symptoms. AR 554-56, 679-70. The ALJ's finding  
4 that Dr. Mesher's opinion was inconsistent with his own notes is not substantially  
5 supported by the evidence. Accordingly, the ALJ erred in discounting it for that reason.

6 In discounting Dr. Mesher's opinion based on its inconsistency with the  
7 longitudinal record, the ALJ similarly reasoned that the objective medical evidence often  
8 lacked notes about plaintiff's fatigue and other MS symptoms. AR 21-28. This is not  
9 supported by the record. Much of the objective medical evidence cited by the ALJ is  
10 more supportive of Dr. Mesher's opinion—including statements regarding the plaintiff's  
11 pain (AR 606, 644, 793), fatigue (AR 793), depression (AR 649-51, 598-99, 733), and  
12 anxious mood (AR 488, 723-24). The ALJ's decision to discount Dr. Mesher's opinion  
13 for that reason is not supported by substantial evidence, therefore the ALJ committed  
14 error in doing so.

15 B. Whether the ALJ Properly Evaluated Plaintiff's Subjective Symptom Testimony

16 To reject a claimant's subjective complaints, the ALJ's decision must provide  
17 "specific, cogent reasons for the disbelief." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir.  
18 1995) (citation omitted). The ALJ "must identify what testimony is not credible and what  
19 evidence undermines the claimant's complaints." *Id.*; *Dodrill v. Shalala*, 12 F.3d 915,  
20 918 (9th Cir. 1993). Unless affirmative evidence shows the claimant is malingering, the  
21 ALJ's reasons for rejecting the claimant's testimony must be "clear and convincing."  
22 *Lester*, 81 F.2d at 834. "[B]ecause subjective descriptions may indicate more severe  
23 limitations or restrictions than can be shown by medical evidence alone," the ALJ may  
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1 not discredit a subjective description “solely because it is not substantiated affirmatively  
2 by objective medical evidence.” *Robbins v. Social Sec. Admin.*, 466 F.3d 880, 883 (9th  
3 Cir. 2006).

4 During the hearing, plaintiff testified that his MS symptoms included fatigue,  
5 headaches, neck pain, vision problems, depression, and anxiety, and that he  
6 experiences on and off paresthesia. AR 43, 51, 53-54. Plaintiff explained that due to his  
7 symptoms, he had to close his screen printing business, stopped playing music, and  
8 could no longer attend school two weeks after enrolling. AR 43-44, 59–60. Plaintiff  
9 testified that his symptoms have also prevented him from being able to drive, and that  
10 he often needs help from others to perform daily activities, such as grocery shopping,  
11 cooking, and cleaning. AR 55-57.

12 The ALJ did not fully credit plaintiff’s testimony, finding it inconsistent with (1) the  
13 objective medical evidence, (2) his daily activities, and (3) his own statements. AR 20,  
14 21-28. Plaintiff assigns error to the ALJ’s findings on all these grounds.

15 With regards to the ALJ’s first reason, an inconsistency with the objective  
16 medical evidence may serve as a clear and convincing reason for discounting a  
17 claimant’s testimony. *Regennitter v. Comm’r of Social Sec. Admin.*, 166 F.3d 1294,  
18 1297 (9th Cir. 1998).

19 Here, the ALJ reasoned that much of the medical evidence did not mention  
20 fatigue, headaches, or pain. AR 21-28. However, a mere “lack of medical evidence  
21 cannot form the sole basis for discounting [symptom] testimony.” *Burch v. Barnhart*, 400  
22 F.3d 676, 681 (9th Cir. 2005). The ALJ also pointed out that the treatment notes that do  
23 mention plaintiff’s symptoms do not indicate the degree of limitation as alleged by  
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1 plaintiff. AR 27. For example, the ALJ considered a treatment note by Dr. Repovic  
2 where plaintiff described having pulsating headaches, but because the note did not  
3 mention that plaintiff was bedridden, the ALJ concluded plaintiff's testimony was not  
4 credible. *Id.* This is an error, as an ALJ's decision may not reject a claimant's subjective  
5 symptom testimony "solely because the degree of pain alleged is not supported by  
6 objective medical evidence." *Orteza v. Shalala*, 50 F.3d 748, 749-50 (9th Cir. 1995);  
7 *Byrnes v. Shalala*, 60 F.3d 639, 641-42 (9th Cir. 1995) (applying rule to subjective  
8 complaints other than pain).

9 Additionally, the ALJ seems to focus only on certain symptoms while  
10 disregarding other symptoms. For example, the ALJ cited to treatment notes that do not  
11 discuss plaintiff's fatigue or explicitly state that plaintiff denied headaches. However,  
12 those same notes show that plaintiff experienced neck pain, vision problems, and  
13 depression. AR 493, 496, 554, 606, 723, 793, 807. Another notable example is the  
14 ALJ's citation to a psychological evaluation by Dr. Knapp, who observed plaintiff as  
15 alert, pleasant, and cooperative. AR 651. The ALJ found this portion of the evaluation  
16 "unremarkable" but disregards Dr. Knapp's opinion that plaintiff was depressed and  
17 anxious. AR 649.

18 In other words, the ALJ's evaluation of plaintiff's subjective testimony is based on  
19 improper "cherry-picking" of aspects of the record that support the ALJ's decision. See  
20 *Ghanim v. Colvin*, 763 F.3d 1154, 1164 (9th Cir. 2014) The ALJ "has an independent  
21 'duty to fully and fairly develop the record and to assure that the claimant's interests are  
22 considered.'" *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001) (*quoting*  
23 *Smolen v. Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996) (*quoting Brown v. Heckler*, 713  
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1 F.2d 411, 443 (9th Cir. 1983) (per curiam))). The ALJ has failed to do so here, therefore  
2 the ALJ has committed harmful error.

3 Regarding the ALJ's second reason, a claimant's participation in everyday  
4 activities indicating capacities that are transferable to a work setting may constitute a  
5 specific and legitimate reason for discounting a medical opinion. See *Morgan v. Comm'r*  
6 *Soc. Sec. Admin.*, 169 F.3d 595, 600 (9th Cir.1999). Yet disability claimants should not  
7 be penalized for attempting to lead normal lives in the face of their limitations. See  
8 *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998), citing *Cooper v. Bowen*, 815 F.2d  
9 557, 561 (9th Cir.1987) (a disability claimant need not "vegetate in a dark room" in order  
10 to be deemed eligible for benefits).

11 Here, the ALJ listed driving, camping, woodworking, attending school, playing  
12 musical instruments, and designing artwork for an album inconsistent with plaintiff's  
13 testimony regarding his MS symptoms. AR 21, 23-24, 26-28. Besides playing musical  
14 instruments, the ALJ does not explain with sufficient specificity how any of these  
15 activities contradict Plaintiff's testimony, especially since plaintiff testified that he  
16 stopped driving his motorcycle (AR 47-50), he was having difficulty attending school  
17 (AR 44), and the record states that plaintiff found camping "too tiring" (AR 836). The ALJ  
18 also does not explain how these activities would be transferrable to work setting,  
19 therefore the ALJ's finding that plaintiff's activities conflicted with his subjective  
20 symptoms was not a clear and convincing reason to discount plaintiff's testimony.

21 With regards to the ALJ's third reason, an ALJ may consider inconsistent  
22 statements when evaluating the reliability of a claimant's testimony as a whole. *Fair v.*  
23 *Bowen*, 885 F.2d 597, 604 n.4 (9th Cir. 1989). "A single discrepancy fails, however, to  
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1 justify the wholesale dismissal of a claimant's testimony." *Popa v. Berryhill*, 872 F.3d  
2 901, 906-07 (9th Cir. 2017).

3 Here, the ALJ pointed to plaintiff's testimony that he had stopped using marijuana  
4 for a year and a half (AR 64), contradicting the notes in the record that shows plaintiff  
5 was using marijuana products as recently as October 2019. AR 491, 649, 708, 648,  
6 708. This finding by the ALJ is supported by the record but this discrepancy is one that  
7 that does not "justify the wholesale dismissal of a claimant's testimony," especially since  
8 the ALJ's other reasons for discrediting plaintiff's testimony were not supported by  
9 substantial evidence. See *Popa*, 466 F.3d at 883–84.

10 4. Harmless Error

11 An error is harmless only if it is not prejudicial to the claimant or "inconsequential"  
12 to the ALJ's "ultimate nondisability determination." *Stout v. Comm'r Soc. Sec. Admin.*,  
13 454 F.3d 1050, 1055 (9th Cir. 2006).

14 In this case, the ALJ's errors were not harmless because a proper evaluation of  
15 Dr. Mesher's opinion and plaintiff's subjective testimony could change the ALJ's  
16 assessment of Plaintiff's RFC and may affect the hypotheticals provided to the  
17 Vocational Expert.

18 C. Whether Step Three Findings are Required when the ALJ Evaluates the RFC;  
19 and Whether Additional Proceedings Should be Conducted on Remand

20 Plaintiff argues that the ALJ erred by not specifically including in the RFC her  
21 finding that plaintiff had moderate limitations in concentration, persistence, and pace.  
22 Dkt. 11, pp. 14-15.

1 Social Security regulations provide that in assessing disability claims,  
2 adjudicators must remember that the limitations identified in the paragraph B criteria  
3 “are not an RFC assessment but are used to rate the severity of mental impairment(s)  
4 at steps 2 and 3 of the sequential evaluation process.” See SSR 96-8p.

5 “Between steps three and four, the ALJ must, as an intermediate step, assess  
6 the claimant's RFC.” *Bray v. Comm’r of Social Security Admin.*, 554 F.3d 1219, 1222–  
7 23 (9th Cir. 2009). In formulating the mental health RFC assessment used at steps 4  
8 and 5 of the sequential evaluation process, the ALJ is required to perform “a more  
9 detailed assessment by itemizing various functions contained in the broad categories  
10 found in paragraphs B and C of the adult mental disorders listings in 12.00 of the Listing  
11 of Impairments, and summarized on the PRTF (Psychiatric Review Technique Form).”  
12 SSR 96-8p.

13 The ALJ's task when assessing the RFC is not to provide an adequate  
14 explanation for how the RFC accommodates the ALJ's paragraph B findings, but rather  
15 to perform a new, more detailed assessment incorporating *all* the relevant evidence.  
16 SSR 96-8p. See *e.g. Israel v. Astrue*, 494 F. App'x 794 (9th Cir. 2012) (noting that the  
17 mental limitations identified at step three of the sequential evaluation process are not an  
18 RFC assessment, and that the ALJ must consider the step three limitations along with  
19 all the relevant evidence in formulating the RFC). Error, if any, was therefore harmless  
20 in this case.

21 “The decision whether to remand a case for additional evidence, or simply to  
22 award benefits[,] is within the discretion of the court.” *Trevizo v. Berryhill*, 871 F.3d 664,  
23 682 (9th Cir. 2017) (quoting *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987)). If  
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1 an ALJ makes an error and the record is uncertain and ambiguous, the court should  
2 remand to the agency for further proceedings. *Leon v. Berryhill*, 880 F.3d 1041, 1045  
3 (9th Cir. 2017). Likewise, if the court concludes that additional proceedings can remedy  
4 the ALJ's errors, it should remand the case for further consideration. *Revels*, 874 F.3d  
5 at 668.

6 The Ninth Circuit has developed a three-step analysis for determining when to  
7 remand for a direct award of benefits. Such remand is generally proper only where

8 “(1) the record has been fully developed and further administrative  
9 proceedings would serve no useful purpose; (2) the ALJ has failed to  
10 provide legally sufficient reasons for rejecting evidence, whether claimant  
11 testimony or medical opinion; and (3) if the improperly discredited  
12 evidence were credited as true, the ALJ would be required to find the  
13 claimant disabled on remand.”

14 *Trevizo*, 871 F.3d at 682-83 (quoting *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir.  
15 2014)).

16 The Ninth Circuit emphasized in *Leon v. Berryhill* that even when each element is  
17 satisfied, the district court still has discretion to remand for further proceedings or for  
18 award of benefits. 80 F.3d 1041, 1045 (9th Cir. 2017).

19 Here, the ALJ erred by improperly evaluating Dr. Mesher's opinion and plaintiff's  
20 subjective testimony. There is ambiguity in the record concerning the specific work-  
21 related limitations associated with Dr. Mesher's opinion and plaintiff's assertions about  
22 his capacity to perform work-related functions. Accordingly, remand for further  
23 proceedings is the appropriate remedy. On remand, the ALJ is directed to re-evaluate  
24 the opinions of Dr. Mesher and plaintiff's symptom testimony and allow plaintiff to  
25 provide additional testimony and evidence, as necessary to clarify the record.

CONCLUSION

Based on the foregoing discussion, the Court finds the ALJ erred when he determined plaintiff to be not disabled. Defendant's decision to deny benefits therefore is REVERSED and this matter is REMANDED for further administrative proceedings.

Dated this 22nd day of March, 2022.



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Theresa L. Fricke  
United States Magistrate Judge